STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL HORAN, Charging Party, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Respondent.	Case No. SF-CO-219-M PERB Decision No. 2204-M September 23, 2011

Appearances: Chauvel, Abraham, Descalso by A.K. Abraham, Attorney, for Michael Horan; Weinberg, Roger and Rosenfeld by Vincent A. Harrington, Jr., Attorney, for Service Employees International Union, Local 1021.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Michael Horan (Horan) of a Board agent's dismissal of Horan's unfair practice charge. The charge alleges that Service Employees International Union, Local 1021 (SEIU) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to represent Horan at an arbitration hearing that arose out of disciplinary proceedings. The charge alleges that this conduct constitutes a violation of MMBA section 3509 et seq. and PERB Regulation 32604.[2] The Board agent dismissed the charge as untimely.

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

We have reviewed the unfair practice charge, the amended charge, the warning and dismissal letters, the appeal and the entire record in light of the relevant law. Based on this review, we affirm the dismissal for the reasons set forth below.

BACKGROUND

Horan was employed as a park patrol officer in the Recreation and Park Department of the City and County of San Francisco (City), and was a member of a bargaining unit represented by SEIU.

Horan filed an unfair practice charge on January 12, 2010. The charge states in its entirety:

> The union failed to represent me at an arbitration hearing scheduled for July 13, 2009 involving discipline imposed against me by my employer. **This was an independent failure to represent me; it also was a continuing practice of the union of failing to process grievances filed by me as early as September 2008.** For the union's failure to properly represent me, I seek the pay and other benefits I should have received 'but for' the union's breach of its duty of fair representation, estimated at $32,000+, plus the pension benefit differential (amount currently undetermined).

(Bold added.)

SEIU's position papers in response to the charge included a copy of a complaint for damages (civil complaint) filed by Horan in the United States District Court for the Northern District of California on March 13, 2009, against the City, SEIU and an individually named defendant.[3] The first claim for relief in the civil complaint is against the City and SEIU for breach of the duty of fair representation. In this claim, Horan alleges that he submitted multiple complaints with the City alleging discrimination, retaliation and harassment, and multiple grievances with SEIU alleging contract violations, in September and December of

[3] According to Horan, the lawsuit was ultimately dismissed.

2008. The civil complaint alleges that Horan was constructively discharged on November 21, 2008, and compelled to resign. The civil complaint also alleges that SEIU never responded to the grievances.[4]

Based in part on Horan's own allegations in the civil complaint, the Board agent issued a warning letter advising Horan that his charge was untimely. The Board agent concluded that the July 13, 2009, arbitration referenced in the unfair practice charge was the culmination of the September and December 2008, grievances referenced in the complaint, and that the statute of limitations began to run at the time SEIU refused to process the grievances rather than at a later date when the grievances were elevated to arbitration.

In response to the warning letter, Horan filed an amended charge on August 4, 2010, which differed from the original charge in three ways: (1) a sentence in the original charge, which appears in bold in the above quoted material, was deleted; (2) the sentence immediately following the deleted sentence was changed to specify that the failure to represent was "in the arbitration;" and (3) the remedy was slightly modified (in a manner not material here). Because the Board agent concluded that Horan failed to provide her with additional facts responsive to her request in the warning letter, the charge was dismissed as untimely by letter dated August 9, 2010.

Horan argues on appeal that by stripping the charge of any reference to the earlier grievances, Horan cured the timeliness issue because the only remaining allegation concerns conduct that ostensibly occurred within the six-month limitations period, i.e., SEIU's failure to represent Horan at the July 13, 2009 arbitration.

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[4] SEIU relies on the civil complaint to argue that Horan knew or should have known of the conduct underlying the unfair practice charge on March 13, 2009, the date Horan sued SEIU for breach of the duty of fair representation. Because the charge was not filed within six months of this date, SEIU argues that it is untimely. For reasons explained herein, the Board assumes for purpose of analysis that the charge was timely filed.

Horan's appeal also provides the factual context in which the July 13, 2009 arbitration occurred, facts that had not been previously alleged. In or around September 2008, the City expressed an intent to suspend Horan for an alleged infraction of the City's harassment policy. In or around October 20008, Horan participated in a *Skelly*[5] hearing and was represented by SEIU. Following the *Skelly* hearing, the City affirmed the suspension. At SEIU's request, the July 13, 2009 arbitration was scheduled in order to challenge the suspension. According to Horan, Horan and SEIU were in contact in the weeks preceding the arbitration. On the day of the arbitration, SEIU called Horan to tell him that SEIU would not be representing him. When Horan called the arbitrator, he was told that SEIU had cancelled the arbitration.

DISCUSSION

Timeliness

A charging party bears the burden of demonstrating that the unfair practice charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.) For a charge to be timely, the alleged unfair practice has to have occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct

[5] Because permanent public employees have a protected property interest in their employment, they are entitled to certain pre-disciplinary due process safeguards, including the right to respond, either orally or in writing, to the authority imposing the discipline. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*).)

underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)[6]

In cases alleging a breach of the duty of fair representation, the six-month limitations period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*Los Rios College Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889.)

In the amended charge, the only conduct complained of by Horan is SEIU's failure to represent him at the July 13, 2009 arbitration. Despite having been asked to do so, Horan did not provide the Board agent with sufficient facts in which to easily determine the nature and genesis of the July 13, 2009 arbitration. In dismissing the charge, the Board agent relied in part on information from the civil complaint provided by SEIU to find that the July 13, 2009 arbitration was the culmination of earlier grievances that SEIU had refused to process. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M [nothing in the MMBA or PERB law requires a Board agent to ignore the facts provided by the respondent and to only consider the facts provided by the charging party].)

Based on the allegations in the amended charge alone, it appears that the July 13, 2009 arbitration concerned a disciplinary action that was not necessarily an outgrowth of the earlier grievances. Accordingly, for purposes of reaching the issue whether the charge states a prima facie breach of the duty of fair representation, we find that the charge was timely filed because it was filed on January 12, 2010, which is within the six-month limitations period, using July 13, 2009, as the date upon which the statute of limitations began to run.

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[6] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

New Evidence on Appeal

In his appeal, Horan presents new factual allegations that were not presented in the original or amended charge. These allegations concern the circumstances in which the July 13, 2009 arbitration arose including the City's expression of intent to suspend Horan in September 2008, the *Skelly* hearing in October 2008, the contact between Horan and SEIU prior to the arbitration, and the pull-out by SEIU and cancellation of the arbitration on July 13, 2009.

PERB Regulation 32635(b) provides: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (*Los Banos Unified School District* (2009) PERB Decision No. 2063 [new evidence on appeal not considered where charging party was aware of such evidence prior to filing the charge and there was no demonstration of good cause].) The purpose of this regulation "is to require the charging party to present its allegations and supporting evidence to the Board in the first instance, so that that Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case." (*South San Francisco Unified School District* (1990) PERB Decision No. 830.)

On July 9, 2010, the Board agent issued a warning letter advising Horan that the charge "as presently written" does not state a prima facie case. The Board agent invited Horan to amend the charge if there were any factual inaccuracies in the warning letter. Horan was also invited to provide additional facts that would correct the deficiencies in the charge as outlined in the warning letter. In response, Horan filed an amended charge that in main part deleted a sentence from the original charge, and provided no additional facts. The Board agent dismissed the charge on August 9, 2010.

All of the allegations presented by Horan for the first time on appeal refer to events that predate the dismissal of the charge. Horan does not offer any evidence of good cause for his

failure to provide these new allegations to the Board agent at the charge processing stage. Thus, they are not considered here.

The Prima Facie Case

Charging Party's Burden

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S (*State of California*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The purpose of the Board agent's review is to determine if the charge states sufficient facts which, if proven, would constitute an unfair practice. (*Regents of the University of California* (2004) PERB Decision No. 1585-H; *SEIU – United Healthcare Workers West, Local 2005 (Hayes)* (2011) PERB Decision No. 2168-M.) At the charge processing stage, the burden to provide specific allegations of fact, which demonstrate a prima facie case that an unfair practice has been committed, is on the charging party. (*Sacramento Municipal Utility District* (2006) PERB Decision No. 1838-M.)

The Duty of Fair Representation

While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (*Hussey v. Operating Engineers* (1995) 35 Cal.App.4th 1213, 1219 (*Hussey*).) In *Hussey*, the court further held that the duty of fair

representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members, . . . absent a showing of arbitrary exercise of the union's power." (*Ibid.*)

In order to state a prima facie violation of the duty of fair representation under the MMBA, a charging party must at a minimum allege facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (*International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M.) The burden is on the charging party to show how an exclusive representative abused its discretion, and not on the exclusive representative to show how it properly exercised its discretion. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.)

The duty of fair representation extends only to contractually-based remedies under the union's exclusive control. (*Bay Area Air Quality Management District Employees Association (Mauriello)* (2006) PERB Decision No. 1808-M (*Bay Area Air*); *Professional Engineers in California Government (Lopez)* (1989) PERB Decision No. 760-S (*Professional Engineers*); *California State Employees Association (Parisi)* (1989) PERB Decision No. 733-S [duty of fair representation extends only where union is acting in its capacity as the exclusive representative].) There is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such member can obtain a particular remedy. (*Ibid.*) The duty of fair representation does not apply in cases involving a forum that concerns an individual right unconnected with negotiating or administering a collective bargaining contract. (*International Union of Operating Engineers, Local 501, AFL-CIO (Huff)* (2000) PERB Decision No. 1382-S; *California State Employees Association (Darzins)* (1985) PERB Decision No. 546-S [union's refusal to provide representation in an

extra-contractual proceeding does not bar individual from seeking redress on his own]; *Los Rios College Federation of Teachers, Local 2279, CFT/AFT, AFL-CIO (Deglow)* (1993) PERB Decision No. 992.)

Consistent with these principles, PERB has long held that a union has no duty to represent its members at pre-deprivation *Skelly* hearings. The duty of fair representation does not apply in a *Skelly* hearing because disciplinary issues are ordinarily handled in extra-contractual proceedings where the union does not possess exclusive control over the means to a particular remedy. (*Bay Area Air, supra,* PERB Decision No. 1808-M; *Professional Engineers, supra,* PERB Decision No. 760-S; *Service Employees International Union, Local 99 (Wardlaw)* (1997) PERB Decision No. 1219.)[7]

The amended charge here consists of two sentences. The first sentence describes the alleged actionable conduct; the second describes the remedy sought. In the first sentence, Horan alleges that SEIU "failed to represent me at an arbitration hearing scheduled for July 13, 2009 involving discipline against me by my employer." He, however, does not allege any facts from which it becomes apparent in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. In other words, Horan does not show how SEIU's failure to represent him at the arbitration constitutes a breach of

[7] In *Lane v. I.O.U.E. Stationary Engineers* (1989) 212 Cal.App.3d 164, 169-171 (*Lane*), the court held that even though the duty of fair representation is inapplicable in extra-contractual proceedings, a duty "akin" to the duty of fair representation may arise where the union chooses to provide representation. PERB, however, has never adopted this theory as the basis for an unfair practice charge. (*California Teachers Association and Oakland Education Association (Welch)* (2006) PERB Decision No. 1850; see also, *California Union of Safety Employees (John)* (1994) PERB Decision No. 1064-S [reversing in part proposed decision finding breach of duty based on *Lane* theory, Board found it unnecessary "to determine whether a *Lane* duty of fair representation attaches to union representation in extra-contractual services"].) Rather, PERB has viewed the court's decision in *Lane* as implicating a cause of action in state court outside PERB's jurisdiction. (*Oakland Education Association (McKeel)* (2000) PERB Decision No. 1383; *California State Employees Association (Cohen)* (1993) PERB Decision No. 980-S.)

the duty of fair representation. Arguably the who, when and where are adequately alleged, but the what and how are almost entirely missing. Even under a liberal interpretation of the charging party's burden, the amended charge fails to state a prima facie violation.

Even were we to consider the facts alleged for the first time on appeal, they do not remedy the problem. In the appeal, Horan alleges that "at the last minute" SEIU withdrew from its prior commitment to represent him at the July 13, 2009 arbitration "after having represented him in the predecessor Skelly hearing."

As stated by Horan, the July 13, 2009 arbitration arose out of a "predecessor Skelly hearing." He does not, however, allege that SEIU's representation arose out of an obligation found in the collective bargaining agreement (CBA). Horan did not include a copy of the CBA with his charge, nor did he allege the specific CBA provision he claims was violated in the disciplinary action taken against him. Neither did Horan allege that SEIU possessed exclusive control over the July 13, 2009, post-*Skelly* arbitration hearing and the available remedies associated with that process. Thus, there is no factual showing that there was anything more at stake than an individual right unconnected with negotiating or administering a collective bargaining agreement. Similarly, there was no factual showing that Horan was not allowed to represent himself or that SEIU prevented him from doing so.

As discussed above, it is Horan's burden to allege the "who, what, when, where and how" of an unfair practice. (*State of California, supra,* PERB Decision No. 1071-S.) Otherwise, the Board is left to guess at the facts necessary to establish a prima facie violation, which it cannot do.

Accordingly, we find that Horan fails to meet his burden of providing specific allegations of fact demonstrating a prima facie breach of the duty of fair representation.

ORDER

The unfair practice charge in Case No. SF-CO-219-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.